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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2060

CARL M. AUSTIN, *et al.*,

Appellants,

v.

STATE OF NEW HAMPSHIRE, *et al.*,

Appellees.

On Appeal from the Supreme Court of the State of New Hampshire

AMICUS CURIAE BRIEF OF THE ATTORNEY GENERAL OF NEW JERSEY

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Interest of the Amicus

In 1961 the State of New Jersey enacted the Emergency Transportation Tax Act (N.J.S.A. 54:8A-1 *et seq.*). This law imposes an emergency tax for a limited period (which has subsequently been extended for another specific period) for transportation purposes. The tax is measured by certain income and gains derived by residents of New Jersey from sources within another State with respect to which there is a "critical transportation problem" inter-

state and by residents of such other State from sources within New Jersey. New Jersey residents are given a credit against the New Jersey tax for income taxes paid to the other "critical transportation problem" State.* All of the Emergency Transportation Tax Revenues are paid into a special transportation fund which is used exclusively to finance projects and programs to help relieve the transportation problems between New Jersey and the other State.

Another transportation tax, the Transportation Benefits Tax, was enacted in 1971 (N.J.S.A. 54:8A-58 *et seq.*). This tax is similar in most respects to the Emergency Transportation Tax. However, the amount of the tax differs and it is restricted to those "severe transportation problem" areas involving 100,000,000 to 300,000,000 interstate crossings annually by commuters between New Jersey and another State.

A "critical transportation problem" has been found to exist in the New Jersey-New York area and accordingly, the Emergency Transportation Tax has been applied to those persons who commute to work between those two States.** The special transportation fund resulting from

* Non-residents are also given a credit against the tax for income taxes paid to their State of residence if that State provides a similar credit against its income tax to New Jersey residents who work in that State.

** The New York State Income Tax Law previously permitted a credit against the tax for income taxes paid by non-residents. Immediately after the enactment of the Emergency Transportation Tax Act in 1961, which permitted a similar tax credit for taxes paid by non-residents who work in New Jersey, only New Jersey residents had to pay the New Jersey Emergency Transportation Tax. However, shortly after the passage of the New Jersey tax, New York amended its law to allow the tax credit only to New York residents. The New Jersey tax credit for non-residents was then changed to the reciprocal form reflected in the previous footnote.

the Emergency Transportation Tax has been expended upon projects to alleviate this transportation problem. Similarly, a "severe transportation problem" has been found to exist in the New Jersey-Pennsylvania area requiring the imposition of the Transportation Benefits Tax. Likewise, the receipts from the Transportation Benefits Tax have been used to help relieve the interstate transportation problems between New Jersey and Pennsylvania.

The transportation taxes imposed by New Jersey thus differ from the New Hampshire income tax involved in the present matter since the revenues from the New Jersey taxes are used solely to alleviate transportation problems encountered by the interstate commuters while the New Hampshire tax revenues are not so dedicated. Also, each of the New Jersey taxes has a uniform tax rate. Nevertheless, the New Jersey and New Hampshire taxes are similar insofar as the tax revenues are derived solely from non-residents because each of the taxing statutes permit residents a credit for income taxes paid to the State wherein such persons work. Non-residents who work in New Jersey and New Hampshire do not receive such a credit for income taxes they pay to the State in which they reside.* Since the New Jersey and New Hampshire tax rates are identical to the tax rates of the States wherein such residents work, therefore, the residents of New Jersey and New Hampshire receive a full credit against any taxes due to their States of residence.

Because the revenue of the New Jersey transportation taxes is derived from non-residents who work in the State, and thus is similar to the source of the funds of the New Hampshire income tax, the State of New Jersey is filing this *amicus curiae* brief.

* This is similar to the income tax treatment afforded non-residents by the States surrounding New Jersey and New Hampshire.

ARGUMENT

POINT I

The appeal should be dismissed for want of jurisdiction because the appellants have not shown sufficient injury to establish a "case" or "controversy" under the United States Constitution.

Article III, Section 2, of the United States Constitution expressly provides that the judicial power of the constitutional courts of the United States is limited to "cases" and "controversies". In determining whether a "case" or "controversy" is presented by a taxpayer who alleges the unconstitutionality of a state taxation statute, this Court has uniformly held that the taxpayer must show a direct injury from the application of the tax in question.* As noted in *Doremus* v. *Board of Education of Hawthorne*, 342 U. S. 429 (1952):

> "Without disparaging the availability of the remedy by taxpayer's action to restrain unconstitutional acts which result in direct pecuniary injury, we reiterate what the Court said of a federal statute as equally true when a state Act is assailed: 'The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.'
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> • • •
>
> "We do not undertake to say that a state court may not render an opinion on a federal constitutional question even under such circumstances that it can be regarded only as advisory. But, because our own jurisdiction is cast in terms of 'case or controversy,' we cannot accept as the basis for review, nor as the basis for conclusive disposition of an issue of federal law without review, any procedure which does not constitute such.
>
> The taxpayer's action can meet this test, but only when it is a good-faith pocketbook action.
>
> • • •
>
> "It is not a question of motivation but of possession of the requisite financial interest that is, or is threatened to be, injured by the unconstitutional conduct." 342 U. S. 434-435.

In the present case, the appellants have not shown that they are in any way injured by the application of the New Hampshire Commuters Income Tax. They admit, in Point III of their brief, that as Maine residents they receive a tax credit from the State of Maine for the Commuters Income Tax paid the State of New Hampshire. As noted by the New Hampshire Supreme Court:

> "Since these plaintiffs pay no greater tax by reason of the New Hampshire tax than they would otherwise pay to Maine, they are not prejudiced

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* Notwithstanding that a complainant possesses sufficient interest to institute a suit in a State court, his standing to litigate an appeal in a federal court poses a separate issue to be resolved independently of the State requirements. As stated in *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 282-283 (1961):

> "Whether the appellant has standing to attack the state statute in this Court is, however, a separate issue, to which we must bring our independent judgment. [cases cited] The controlling question is whether the appellant 'has sustained or is immediately in danger of sustaining some direct injury as the result of [the statute's] enforcement . . .'"

by the Commuters Income Tax." *Austin et al.* v. *State Tax Commission,* 316 A. 2d 165, 167 (1974).

Appellants' real discontent is found in the last sentence of Point III of their brief: "Tax dollars are being collected and diverted from the appellants' domiciliary state . . ." However, this certainly is not a direct injury to the appellants, but rather is a matter which should be raised by the State of Maine.* Significantly, Maine *does* assert in its *amicus* brief that Maine (*not the appellants*) would receive $400,000 additional revenue if the New Hampshire tax were eliminated. In other words, the gain which may result from the elimination of the New Hampshire tax would inure to the benefit of the surrounding *States,* such as Maine and Vermont, and would not result in a direct lowering of the taxes to *individual taxpayers.***

In its *amicus* brief, Maine and Vermont rely upon *Flast* v. *Cohen,* 392 U. S. 83 (1968) in an attempt to show that appellants have standing to challenge the New Hampshire tax as a "taxpayers suit". But, the *Flast* decision notes the requirement of a nexus between the taxpayer's status and the precise nature of the constitutional infringement

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* Even though the States of Maine and Vermont filed an *amicus* brief in this Court, they are not direct parties to the action.

** Maine attempts to allocate the $400,000 State gain to the appellants by dividing this figure among *all Maine* taxpayers (not only those Maine taxpayers working in New Hampshire) and arrives at a 40¢ average taxpayer amount. The necessity to utilize *all Maine* taxpayers in the computation, and not merely those Maine residents who work in New Hampshire, graphically illustrates that it is the State of Maine that is harmed by the New Hampshire tax and not the Maine residents who work in New Hampshire, such as the appellants, who will still pay the same amount of tax if the New Hampshire tax is eliminated—albeit to Maine instead of New Hampshire.

alleged. It is asserted at pages 8 and 9 of the *amicus* brief that appellants meet this requirement since their "status as taxpayers is closely related to the constitutional infringement in issue." However, unlike the appellants in *Flast* who were directly injured by the alleged establishment of religion violation, the appellants in the present case are not directly harmed by the alleged constitutional defects of the New Hampshire tax law. Rather, it is the other States, such as Maine and Vermont, which would be harmed by any constitutional defects since they suffer the revenue loss. As a matter of fact, in the *Flast* opinion the Court noted this distinction between the interests of the taxpayers and the states when it discussed *Frothingham* v. *Mellon,* 262 U. S. 447 (1923):

> "In essence, Mrs. Frothingham was attempting to assert the States' interest in their legislative prerogatives and not a federal taxpayer's interest in being free of taxing and spending in contravention of specific constitutional limitations imposed upon Congress' taxing and spending power." 392 U. S. at 105.

The appellants in the present case are like Mrs. Frothingham (who did not have the requisite standing) since they cannot show direct injury without referring to the interest of the State of Maine.

Both appellants and *amicus* cite *Allied Stores of Ohio* v. *Bowers,* 358 U. S. 522 (1959) in support of their contention that it is unnecessary to show that appellants will benefit by having the New Hampshire law declared unconstitutional. However, even though the appellant in *Allied Stores* was not itself covered by the tax exemption in question, nevertheless the tax exemption permitted out-of-state competitors to operate warehouses in Ohio with-

out being subject to the Ohio tax. Thus the appellant did have a direct pecuniary interest in challenging the Ohio tax exemption.

Finally, in a vain attempt to discover some "harm" to the appellants, the *amicus* brief refers to the withholding rate of the New Hampshire tax and alleges that because of the difference between that rate and the withholding rate of the Maine tax, the appellants are injured. However, the *amicus* brief later correctly admits (at page 14) that "the mere act of withholding might well not constitute legal harm in most tax schemes" citing *Travis* v. *Yale & Towne Manufacturing Co.*, 252 U.S. 60, 77 (1920).

In summary, because appellants have not shown that they are injured or harmed by the operation of the New Hampshire Commuters Income Tax Law, they have not presented a substantial justiciable "case" or "controversy" as required by the United States Constitution.

POINT II

The New Hampshire Commuters Income Tax is not violative of the privileges and immunities or equal protection clauses of the United States Constitution because it does not subject appellants to any additional tax burden.

In determining whether a state taxing law contravenes rights secured by the Constitution, "the decision must depend not upon any mere question of form, construction, or definition, but upon the practical operation and effect of the tax imposed." *Shaffer* v. *Carter*, 252 U.S. 37, 55 (1920). The same operational factors of the New Hampsire Commuters Income Tax which demonstrate appellants' lack of standing also show that the tax does not

violate their rights under either the privileges and immunities clause in Article IV, Section 2, of the Constitution or the equal protection clause in the Fourteenth Amendment to the Constitution.

The object of the privileges and immunities clause is "to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned." *Paul* v. *Virginia*, 75 U.S. 168, 180 (1868). In its actual operation, the New Hampshire tax in no way places non-residents of New Hampshire, such as appellants, at a disadvantage vis-a-vis New Hampshire residents. The non-residents are subjected to tax by their states of residence (such as Maine) upon all their income prior to their entry into New Hampshire. Thus any difference in tax treatment between New Hampshire residents and non-residents arises *not* by virtue of the New Hampshire tax, but rather by the imposition of income taxes by the states surrounding New Hampshire. Even if New Hampshire did not have a commuters tax, there would be a difference in tax treatment between New Hampshire residents and non-New Hampshire residents working in the state, caused by the income taxes of the other states imposed upon their residents who work in New Hampshire. The New Hampshire tax merely directs the tax to the state of employment (i.e., New Hampshire) and certainly does not affect the amount of tax to be paid by the non-residents since their tax liability remains unchanged whether or not the New Hampshire tax is imposed.

Contrary to the present situation, in each of the cases involving the privileges and immunities clause cited by the appellants and the States of Maine and Vermont, the challengers were both directly disadvantaged by the law in question, and would have had that disadvantage removed had the law been held to be invalid. For instance, in

Toomer v. *Witsell*, 334 U.S. 385 (1948), the non-residents were disadvantaged because they had to pay a license fee of $2,500 for each shrimp boat which they owned while residents had to pay only $25. Likewise, in *Ward* v. *Maryland*, 79 U.S. 418 (1870) non-residents were disadvantaged by having to pay $300 for a trader's license while residents paid between $12 and $15. However, in the present case, the appellants are not disadvantaged by the New Hampshire law since their tax liability would be the same even without such law. Any disadvantage which they might be subjected to is by virtue of the tax imposed by their state of residence. Therefore, the New Hampshire tax is not violative of their privileges and immunities.

For similar reasons the New Hampshire law does not deny the appellants' equal protection of the law. The relationship of the equal protection clause to tax statutes was summarized in *Chalker* v. *Birmingham & N.W. Ry. Co.*, 249 U.S. 522, 526-527 (1919):

> "The power of a state to make reasonable and natural classifications for purposes of taxation is clear and not questioned; but neither under form of classification nor otherwise can any state enforce taxing laws which in their practical operation materially abridge or impair the equality of commercial privileges secured by the Federal Constitution to citizens of the several States."

The New Hampshire tax does not impose a greater burden upon non-residents than would exist without the tax since non-residents are subjected to tax by their states of residence upon their entire income earned in New Hampshire. The tax burden upon non-residents has thus not been changed by the New Hampshire tax and, therefore, no abridgement or impairment of their commercial privileges has occurred.

The equal protection cases included in the briefs of appellants and the states of Maine and Vermont all refer to situations where the person instituting the action was subjected to a greater tax burden as a result of the law involved and such person would have been relieved of that greater burden if the law were invalidated. For example, in *Louisville Gas & Electric Co.* v. *Coleman*, 277 U. S. 32 (1928), the appellant was denied a recording tax exemption because of the duration of the obligation it sought to record. Upon the finding that the law was unconstitutional due to its unreasonable classification, appellant's greater tax burden was eliminated. Similarly, in *F.S. Royster Guano Co.* v. *Virginia*, 253 U. S. 412 (1920), the appellant was denied a tax exemption afforded corporations deriving income from outside the State. After the law was held to violate the equal protection of the laws, the appellant's tax liability was lowered.

However, in the case *sub judice*, the appellants are not subjected to any greater tax than if there were no New Hampshire tax and thus their tax liability would not be reduced if the tax were eliminated. Consequently, there has been no violation of their right to the equal protection of the laws.

Although the appellants cannot show that they pay any greater tax because of the New Hampshire law, nevertheless they refer to the revenue loss of the State of Maine.* However, it is only because of the action of the states surrounding New Hampshire (such as Maine) that a disparity of tax treatment arises. Each of these states

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* A state is not a "person" entitled to the equal protection of the laws of the Fourteenth Amendment, *Wisconsin* v. *Zimmerman*, 205 F. Supp. 673 (W.D.Wisc. 1962), nor a "citizen" entitled to the rights of the privileges and immunities clause, *Hague* v. *C.I.O.*, 307 U.S. 496 (1939); *Paul* v. *Virginia*, 75 U.S. 168 (1868).

imposes its tax upon the income earned by New Hampshire residents who work in such states, thereby causing a dissimilar tax treatment of New Hampshire residents. New Hampshire is thus given reason for imposing its tax upon residents of that State who work in New Hampshire.

Although imposing income taxes on non-residents appears to be unfair since the non-residents are not given the same benefits as residents (*e.g.* the right to attend public schools and colleges, borrow books from the public libraries, etc.), nevertheless it is important to note that it was *not* New Hampshire that first imposed its income tax on non-residents, but rather it was the surrounding states that imposed their income taxes on New Hampshire residents. Similarly, New Jersey, which has large numbers of its residents commuting to work in New York and Pennsylvania, did not first enact a tax on non-residents, but rather was forced to tax non-residents by the action of its surrounding states which imposed taxes on New Jersey residents. Naturally, New Jersey would rather that each state tax only its own residents since such procedure would not only be fairer to the residents of the State, but also because it is questionable whether the commuter is actually a net burden to the other state.

Significantly, if a surrounding state agrees not to tax New Hampshire residents working in that State, the New Hampshire tax commission is empowered to enter into a reciprocal arrangement not to tax the residents of that State who work in New Hampshire. See New Hampshire R.S.A. 77-B:6.* Therefore any revenue loss to the states

* The New Jersey tax laws also provide for reciprocity between states. See, e.g., N.J.S.A. 54:8A-16(A). As a matter of fact, when the New Jersey law was first enacted, it was only imposed upon New Jersey residents who worked in New York, and New Yorkers working in New Jersey were given a non-resident credit. However, New York then decided to amend its law so as to refuse tax credits to New Jersey residents working in New York, thereby subjecting such persons to the New York tax. The New Jersey law was changed accordingly.

surrounding New Hampshire is caused by the refusal of such states to enter into reciprocal agreements to tax only the residents of such state, thus permitting the tax revenue of non-residents working in such state to revert to the state where such workers reside. The taxes imposed by New Hampshire and New Jersey thus have a similar effect as the New Jersey Counterpart Fee Act, which imposes a tax upon trucking companies using New Jersey roads at the same rate as taxes imposed by the state where such trucks are registered or based, *i.e.* to encourage other states to enter into reciprocal agreements to tax only residents of that state. The constitutionality of this tax was recently upheld in *B & L Motor Freight* v. *Heymann*, 120 N. J. Super. 270, 293 A. 2d 711 (Ch. Div. 1972), aff'd 125 N. J. Super. 372, 311 A. 2d 184 (App. Div. 1973), certification denied 64 N. J. 494, 317 A. 2d 707 (1974), appeal dismissed for want of a substantial federal question —— U. S. —— (1974), 43 Law Week 3326.

As noted above, the New Hampshire tax does not impose any additional tax burden upon the non-residents. However, even if it did, as long as the tax burden is not unreasonable as compared to residents, the tax is valid. For example, in *Travelers' Insurance Co.* v. *Connecticut*, 185 U.S. 364 (1902), the Court upheld a state tax which permitted residents a deduction, but denied such deduction to non-residents, because the non-residents were not burdened by certain other local taxes. Similarly, in *General American Tank Car Corporation* v. *Day*, 270 U.S. 367 (1926), the Court affirmed the validity of a state tax imposed, in lieu of local taxes, on rolling stock owned by non-resident corporations, even though resident corporations were not subject to the tax. Again, the Court examined the relative tax burdens between the residents and non-residents in order to determine whether the tax was discriminatory. More recently, in *Consolidation Coal Co.* v.

Bailey, 467 F. 2d 1124 (3rd Cir. 1972) *cert.* den. 410 U.S. 930 (1973), a municipal ordinance imposing a tax on income earned within the municipality by non-resident workers was upheld.

In judging whether the non-residents were subjected to a reasonable tax burden,* the New Hampshire Supreme Court took into account the taxes paid by New Hampshire residents and non-residents and noted as follows:

> "A resident pays an unearned income tax, a $10 residence tax, and other taxes while the non-resident pays nothing for the state services which protect him and his employment unless by means of this tax which operates to produce a 'practical equality' by means of the power 'to equitably defray the expense of protecting the right of property and other rights'." 316 A. 2d 167.

Thus, the court from which this appeal has been taken expressly found that non-residents are not subjected to a disproportionate tax burden. In the absence of any contrary evidence in the record, this finding should be accepted by the Court.

In brief, the New Hampshire Commuters Income Tax is not unconstitutional since it does not impose any additional tax liability upon non-residents above the amount of tax due to their states of residence. Moreover, even if it did, it is not an unreasonable tax burden compared to the taxes imposed upon New Hampshire residents.

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* It must be noted that the rate of tax is no higher than the taxes imposed by the surrounding states upon New Hampshire residents working in such other states.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the appeal should be dismissed for want of jurisdiction inasmuch as the appellants have not shown the injury required to establish a "case" or "controversy" under the United States Constitution. If this Court does find a "case" or "controversy" is presented, it is further respectfully submitted that the decision of the New Hampshire Supreme Court should be affirmed because the New Hampshire Commuters Income Tax is not violative of the privileges and immunities or equal protection clauses of the Constitution.

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